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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-220

PEDRO PEREZ,

Petitioner,

against

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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OPINIONS BELOW

The opinion of the Supreme Court of Florida, entered on May 16, 1973, is reported at 277 So.2d 778. The opinion of the District Court of Appeal of Florida, Second District, is reported at 267 So.2d 33.

JURISDICTION

Respondent has no quarrel with the jurisdiction of this Court pursuant to Title 28, United States Code, § 1257(3) or under any other provision, at least for purposes of determining whether to decline assumption thereof.

QUESTION PRESENTED

WHETHER A FELONY ARREST UPON PROBABLE CAUSE AND CONSEQUENT SEIZURE OF EVIDENCE ARE UNLAWFUL BECAUSE MADE IN THE ARRESTED PERSON'S HOME IN THE MIDDLE OF THE NIGHT, WITHOUT A WARRANT, ALTHOUGH THE ARRESTING OFFICERS HAD AMPLE TIME TO OBTAIN A WARRANT.

The decision of the Supreme Court of Florida on this point was in the negative.

STATEMENT OF THE FACTS

The facts are sufficiently set forth in the opinion of the Supreme Court of Florida reported at 277 So.2d 778 and will not be repeated here.

ARGUMENT

Petitioner seeks to sustain the narrow premise that his warrantless arrest at his home in the nighttime was unlawful simply because the arresting officers had sufficient time within which to procure an arrest warrant. Initially, it is emphasized that the Florida District Court of Appeal, Second District, credited the trial court's finding of probable cause, *Perez v. State*, 256 So.2d 33, 35 (Fla. App. 2 1972), but reversed petitioner's conviction upon the admitted fact that the officers had ample time to obtain a warrant and also for the following reason:

> "We simply cannot accept the blanket assertion that probable cause to arrest a person for felony justifies intrusion into his home during the nighttime two or three days after the probable cause arose, at least one day after a warrant was sought unsuccessfully, and in the absence of any single fact showing need for action before the facts could be submitted to a magistrate. If the Fourth Amendment means anything, it must protect citizens against the sort of intrusion shown here. Should our Supreme Court review this case, we would hope that their expression in Falcon would be limited to exclude arrests in dwelling houses in the nighttime." *Id.* at 36.

Section 901.15, Florida Statutes, 1971, provides in pertinent part as follows:

"901.15 A peace officer may arrest a person without a warrant when:

"(3) He reasonably believes that a felony has been or is being committed and reasonably believes that the person to be arrested has committed or is committing it."

Please note, the above statute does not say that the arrest thereby authorized cannot be made in the arrested person's home in the nighttime without a warrant if the arresting officer had ample opportunity to obtain a warrant. The irrefutable truth is that there is no verbiage in the above quoted statute or any other Florida statute that forbids the making of an arrest authorized by Section 901.15 (3) in the middle of the night without a warrant if the arresting officer has ample opportunity to obtain a warrant. Interestingly enough, the decision of the Florida Second District Court of Appeal reversing petitioner's conviction was bottomed on this precise fact: "Our decision rests upon the admitted fact that the officers had ample time to obtain a warrant." *Id.* at 35.

The decisional law of this jurisdiction on this point is clear: The absence of an arrest warrant does not necessarily invalidate an arrest based on reasonable grounds to believe that a felony has been committed even though there may have been sufficient time to have obtained an arrest warrant. *Falcon v. State*, 226 So.2d 399 (Fla. 1969);

and *Reis v. State*, 248 So.2d 666 (Fla.App. 3 1971). Thus, by imposing additional re-requirements for the lawful arrest on probable cause to those set out in Chapter 901, Florida Statutes, 1971, the decision of the Florida Second District Court of Appeal was not only contrary to the decisional law of this state but also flies in the teeth of settled principles of Fourth Amendment law long adhered to by this Court.

In *Trupiano v. United States*, 334 U.S. 699, 92 L.Ed. 1663 (1948), respondent relied upon the well-established right of law enforcement officers to arrest without a warrant for a felony committed in their presence and this notwithstanding the fact that there may have been adequate time to procure a warrant of arrest. This Court after pointing out that there was more than adequate probable cause sustained this contention as follows:

> "The absence of a warrant of arrest, even though there was sufficient time to obtain one, does not destroy the validity of an arrest under these circumstances." 92 L.Ed. at 1669.

In *United States v. Rabinowitz*, 339 U. S. 56, 94 L.Ed. 653 (1950), this Court expressly reaffirmed its decision in *Trupiano* relative to the warrantless arrest of a person where there was time to secure a warrant of arrest. However, the rationale of *Trupiano* on the search warrant issue was overruled. Note the following:

"It is appropriate to note that the Constitution does not say that the right of the people to be secure in their persons should not be violated without a search warrant if it is practicable for the officers to procure one. The mandate of the Fourth Amendment is that the people shall be secure against *unreasonable* searches. It is not disputed that there may be reasonable searches, incident to an arrest, without a search warrant. Upon acceptance of this established rule that some authority to search follows from lawfully taking the person into custody, it becomes apparent that such searches turn upon the reasonableness under all the circumstances and not upon the practicability of procuring a search warrant, for the warrant is not required. To the extent that Trupiano v. United States, 334 US 699, 92 L. ed 1663, 68 S.Ct. 1229, requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search after a lawful arrest, that case is overruled. The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. That criterion in turn depends upon the facts and circumstances--the total atmos-

> phere of the case. It is a sufficient precaution that law officers must justify their conduct before courts which have always been and must be, jealous of the individual's right of privacy within the broad sweep of the Fourth Amendment." (Emphasis theirs.)

Similarly, respondent contends that the relevant test as to the validity of an arrest is not whether it was reasonable to procure an arrest warrant, but whether the arrest was reasonable. The Fifth Circuit Court of Appeals has consistently adhered to the principle set forth by this Court in *Trupiano* and *Rabinowitz*. See *Odom v. United States*, 403 F.2d 45 (5th Cir. 1968); *Dailey v. United States*, 261 F.2d 870 (5th Cir. 1958), cert. denied 359 U.S. 969; *United States v. Holiday*, 319 F.2d 775 (2nd Cir. 1963); and *Abramson v. United States*, 326 F.2d 565 (5th Cir. 1964).

Petitioner seeks comfort from this Court's decision in *Jones v. United States*, 357 U.S. 493, 2 L.Ed.2d 1514, 78 S. Ct. 1253 (1958). Respondent submits, however, that the decision in *Jones* invalidating the search as not being incident to a lawful arrest turned on the fact that the testimony of the officers made it clear that their purpose in entering petitioner's home was to search for distilling equipment and not to arrest him. Thus, the facts in *Jones* are readily distinguishable from those in the case *sub judice*.

The Florida Second District Court of Appeal, in reversing petitioner's conviction, relied on *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L.Ed.2d 564, 91 S.Ct. 2022 (1971), remarking that a "reading of *Coolidge* will lead the serious scholar to all that needs to be said." 267 So.2d at 36. It is submitted, however, that even *serious scholars* may disagree as to the scope of this Court's holding in *Coolidge*. Respondent recognizes that in *Coolidge* this Court did discuss as *obiter dicta* the necessity for warrants in general both in the case of arrests and in the case of search and seizure. Respondent lays no claim to being a serious scholar but as we read *Coolidge*, there was no question as to the validity of the arrest of petitioner in his home on the charge of murder. Rather, the case turned upon whether there had been a lawful search and seizure of petitioner's automobile since the warrant for the search and seizure of said automobile did not satisfy Fourth Amendment requirements. In considering the three theories proposed by the state to bring the search of the automobile within one or another of the exceptions to the warrant requirement, this Court discounted all three theories and found that the seizure of the car in the driveway could not be justified as incidental to the arrest which took place inside the house. The argument of the state that police may make a warrantless search of an automobile whenever they have probable cause to do so was rejected since there were no exigent circumstances justifying the warrantless search. And the argument that

the car itself was an instrumentality of the crime and might be seized because it was in plain view was rejected. This Court pointedly remarked that the plain view exception could not justify the seizure of petitioner's automobile under the existing circumstances present in *Coolidge*. We quote:

> "The police had ample opportunity to obtain a valid warrant; they knew the automobile's exact description and location well in advance; they intended to seize it when they came upon Coolidge's property. And this is not a case involving contraband or stolen goods or objects dangerous in themselves." 29 L.Ed.2d at 586.

Thereafter, the majority in commenting on Justice White's dissent went into a lengthy discourse on warrants in general. It is in this section of the opinion that warrantless arrests are discussed. Justice Harlan pointed out in his concurring opinion that the issue of a warrantless entry into a man's home to arrest him on probable cause was left open. Again respondent relies on the corollary to the *Rabinowitz* rule that the relevant test as to the validity of an arrest is not whether it was reasonable to procure an arrest warrant, but whether the arrest was reasonable. It is submitted that if the arrest is supported by probable cause sufficient to meet Fourth Amendment standards, then an arrest is reasonable no matter how long the officer may have enter-

tained such probable cause.

Finally, the following salient facts should be kept in mind:

"Accompanied by several other police officers, Detective Napoli went to the house of respondent Perez shortly after midnight the night of March 22, 1967. He was prompted to go there by information to the effect that respondent had stolen property that came from a burglary Napoli was investigating, a 23-inch RCA color television. This information was received some two or three days previously from a confidential informer who Napoli had known for several years and who had on previous occasions given very reliable information. Napoli did not obtain an arrest warrant or a search warrant before going to respondent's house. The officers knocked on the door and identified themselves to respondent and immediately arrested respondent on probable cause telling him he was being arrested for possession of stolen property, to-wit: the RCA television which Napoli could visibly see from the front porch when respondent opened the door.

"After having invited the officers into his house, respondent turned on the lights in the living room and dining room. While one of the officers read respondent his constitutional rights, Napoli along

> with several officers, saw bolita and gambling paraphernalia on the dining room table which was located approximately five feet from the television." 277 So.2d at 779, 780.

The above facts speak for themselves. There was no forced entry. There was no ransacking of petitioner's home under the guise of being incidental to a lawful arrest. The contraband (bolita and gambling paraphernalia) was seen by the officers in plain view on the table approximately five feet from the television. It is submitted that the discovery of this contraband comes within the plain view doctrine as explicated by this Court in *Coolidge*.

CONCLUSION

The decision of the Florida Supreme Court which petitioner now seeks to have this Court review is in harmony with the prior decisions of this Court delineating rights guaranteed by the Fourth Amendment to the United States Constitution. Consequently, this Court should deny the petition for writ of certiorari.

Dated: November 9, 1973.

Respectfully submitted,

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State of Florida
Attorney for Respondent

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Petition for Writ of Certiorari has been forwarded via U. S. Mail to W. De Hart Ayala, Jr., Suite 405 Legal Center, 725 East Kennedy Boulevard, Tampa, Florida 33602, and Melvin L. Wulf and Burt Neuborne, American Civil Liberties Union Foundation, 22 East 40th Street, New York, New York 10016, attorneys for petitioner, this 9th day of November 1973.

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